



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT NAIROBI**

**CASE NO. 151 OF 2009**

**ALICE KIMETO .....PLAINTIFF**

**VERSUS**

**MARGARET NYAGUTHII NGARI .....1<sup>ST</sup> DEFENDANT**

**GILBERT JOHNSON KIBUIKA KAMAU .....2<sup>ND</sup> DEFENDANT**

**CHIEF LAND REGISTRAR .....3<sup>RD</sup> DEFENDANT**

**THE NATIONAL LAND COMMISSION.....4<sup>TH</sup> DEFENDANT**

**J U D G M E N T**

1. The Plaintiff commenced the instant suit vide a plaint dated 1<sup>st</sup> April 2009 filed in court on 6<sup>th</sup> April 2009. The Plaintiff's claim was that she was the beneficial owner of land parcel title number **Nairobi Block 116/1284** (hereinafter referred to as "**the suit premises**") having purchased the same from one Rebecca Kamoing who was the original allottee of the parcel of land. The Plaintiff averred that although the said Rebecca Kamoing had executed a transfer in her favour, the transfer was not effected owing to misplacement of the lands office file. The Plaintiff averred that when the lands office file was retrieved on or about February 2009, she discovered the suit premises was registered in the 2<sup>nd</sup> Defendant's name. She contends that the transfers from Rebecca Kamoing to the 1<sup>st</sup> Defendant and from the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant were fraudulent, null and void and seeks a declaration to that effect, the cancellation of the transfers to 1<sup>st</sup> and 2<sup>nd</sup> Defendants respectively.

2. The 2<sup>nd</sup> Defendant filed a statement of defence dated 30<sup>th</sup> January 2017 with leave of the Court. In the defence, he stated he is the duly registered owner of the suit property having legally purchased the same from Margaret Nyaguthii Ngari. The 2<sup>nd</sup> Defendant denied the allegations of fraud attributed to him and put the Plaintiff to strict proof. The 1<sup>st</sup> Defendant never appeared and/or filed any defence. The 3<sup>rd</sup> Defendant entered appearance but filed no defence.

3. The suit was heard on 29<sup>th</sup> October 2018 and 9<sup>th</sup> November 2018 when the Plaintiff and the 2<sup>nd</sup> Defendant testified in support of their respective cases. They called no witnesses. Mr. Terer, State Counsel represented the 3<sup>rd</sup> Defendant at the trial and cross examined the witness.

4. The Plaintiff testified that she entered into a sale agreement for purchase of the suit property from one Rebecca Kamong on 12<sup>th</sup> November 1996. She placed reliance in her evidence on her witness statement filed in Court on 21<sup>st</sup> June 2011 and the bundle of documents filed together with the statement. She stated that she never got title to the property as she discovered the property had been transferred to the 1<sup>st</sup> Defendant and subsequently to the 2<sup>nd</sup> Defendant. She stated the transfers to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were effected fraudulently.

5. The 2<sup>nd</sup> Defendant testified through his daughter, Stephanie Gathoni Kibuka to whom she had donated a Power of Attorney to represent him. The witness relied on the 2<sup>nd</sup> Defendant's list of documents dated 30<sup>th</sup> January 2017. It was the Defendant's evidence that he was the registered owner of the suit premises as evidenced by Certificate of Lease registered in the 2<sup>nd</sup> Defendant's name on 12<sup>th</sup> January 2005 ("**DEx.3**") following the registration of the transfer executed in favour of the 2<sup>nd</sup> Defendant by the 1<sup>st</sup> Defendant on 14<sup>th</sup> December 2004 ("**DEx.2**"). The witness affirmed that the transfer was executed by her father but could not verify the signatures attributed to Rebecca Kamoing and Margaret Nyaguthii. She was not aware whether or not her father had a sale agreement with Margaret Nyaguthii. Further the witness could not prove the payment of kshs.500,000/= stated as consideration was paid by her father to Margaret Nyaguthii.

6. At the close of the trial, the parties were directed to exchange written submissions. The Plaintiff filed her submissions on 7<sup>th</sup> December 2018 but the 2<sup>nd</sup> Defendant in spite of being afforded the opportunity to file his submissions did not do so and the Deputy Registrar on 12<sup>th</sup> February 2019 directed the file to be forwarded to me at Kisii Law Courts for purposes of preparing the judgment.

7. Having carefully considered the pleadings and having reviewed and considered the evidence and the submissions filed by the plaintiff, the following issues arise for determination:

- (i) Whether the Plaintiff acquired the suit premises by way of purchase from Rebecca Kamoing?**
- (ii) Whether the transfer of the suit premises to the 1<sup>st</sup> defendant and subsequently to the 2<sup>nd</sup> defendant was validly and lawfully effected?**
- (iii) Whether the transfers to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were null and void and should therefore be cancelled?**
- (iv) What reliefs should the court grant, if at all?**

8. From the evidence adduced by the Plaintiff, there is clear evidence that she had entered into a sale agreement to purchase from Rebecca Kamoing Plot No. 256 in New Roysambu Housing Co. Ltd where Rebecca Kamoing was a shareholder and had been allocated the said plot. This is the Plot which was following subdivision and change of user renumbered Title Number **Nairobi Block 116/1284** and allocated to Rebecca Kamoing as per the letter of allotment dated 14<sup>th</sup> September 1992 exhibited as document 4(ii) in the Plaintiff's bundle of documents. The said Rebecca Kamoing had paid to Maosa & Company Advocates fees for processing of title in respect of parcel no. **1284** as per receipt dated 12<sup>th</sup> May 1993 exhibited as document 4(iii) in the Plaintiff's bundle of documents. The Plaintiff on 13<sup>th</sup> February 1997 paid to Maosa & Company Advocates a sum of kshs. 2,000/= for processing of transfer of Plot No. 256 as per receipt exhibited as document No. 4(iv) in the Plaintiff's bundle of documents. The agreement of sale dated 12<sup>th</sup> November 1996 between the Plaintiff and Rebecca Kamoing is exhibited as document No. 4(v) in the Plaintiff's bundle of documents while a transfer of even date executed by Rebecca Kamoing in favour of the Plaintiff is exhibited as document No. 4(vi). On the available evidence, there is no doubt Rebecca Kamoing was the legal owner of Plot No. 256 New Roysambu Housing Co. Ltd (new number **Nairobi Block/116/1284**) and that she indeed entered into an agreement to sell the said plot to the Plaintiff.

9. Though Rebecca Kamoing was not called to testify as a witness she had on 30<sup>th</sup> March 2009 sworn an affidavit exhibited as document No. 3 in the Plaintiff's bundle of documents where she affirmed she indeed sold the suit premises to the Plaintiff. She denied ever selling the same property to the 1<sup>st</sup> Defendant and/or any other person. She denied she was the one who executed the transfer in favour of the 1<sup>st</sup> Defendant. She averred the execution shown to be by herself was a forgery. I would on the basis of the evidence answer the first issue affirmatively.

10. On the second issue, whether the transfers to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were lawfully effected, it is necessary to evaluate and analyze the evidence adduced having regard to the documentary evidence tendered. The fact that the real actors being the original seller, Rebecca Kamoing and the 1<sup>st</sup> Defendant, Margaret Nyaguthii did not give evidence in Court, makes it necessary to scrutinize the documents to determine their veracity and authentication. Although the Court cannot wear the hat of the handwriting expert the court by comparing the various documents and signatures appended thereto can detect similarities and variations. For instance, the agreement the Plaintiff states she entered into with Rebecca Kamoing on 26<sup>th</sup> November 1996 and the transfer signed on the same date carry a similar signature of the said Rebecca Kamoing. The signature on the affidavit/witness statement by Rebecca Kamoing of 30<sup>th</sup> March 2009 is also similar to the signatures by her on the sale agreement and the transfer referred to above. In contrast, the signature on the transfer of lease to the 1<sup>st</sup> Defendant attributed to Rebecca Kamoing even to the naked eye varies to the signatures signed by Rebecca Kamoing in the sale agreement, transfer and affidavit aforementioned and it is therefore probable that they were not signed by the same person. Indeed, Rebecca Kamoing in the affidavit referred to denied signing the transfer in favour of the 1<sup>st</sup> Defendant or selling her plot to her.

11. The Plaintiff in her witness statement explained that after she purchased the suit premises and obtained all the necessary documents from the seller she was not able to process the transfer as the lands office file could not be traced. She explained that when the file was traced in February 2009 she discovered the 1<sup>st</sup> Defendant had registered the suit property on the basis of a transfer of lease allegedly executed in her favour and further she had transferred the property to the 2<sup>nd</sup> Defendant. The Plaintiff stated that Rebecca Kamoing upon inquiry denied selling the property to the 1<sup>st</sup> Defendant and/or executing a transfer of lease in her favour.

12. On the foregoing basis, the Plaintiff contended the transfers to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants must have been procured fraudulently since Rebecca Kamoing was not a party to the transaction involving the 1<sup>st</sup> Defendant. The 2<sup>nd</sup> Defendant's daughter who testified on behalf of her father had little or no clue as to how her father, the 2<sup>nd</sup> Defendant acquired the suit property. There was no sale agreement produced to demonstrate that the 2<sup>nd</sup> Defendant purchased the suit property from the 1<sup>st</sup> Defendant. Equally, there was no sale agreement between the 1<sup>st</sup> Defendant and Rebecca Kamoing to support the assertion that the 1<sup>st</sup> Defendant had purchased the property from her. The 2<sup>nd</sup> Defendant simply relied on the certificate of ownership in her father's name to assert the property was owned by the 2<sup>nd</sup> Defendant. Under paragraph 5 of the Statement of Defence, the 2<sup>nd</sup> Defendant pleaded thus:-

**5. The 2<sup>nd</sup> Defendant avers that he legally purchased the suit property from Margaret Nyaguthii Ngari and is a stranger to the contents of paragraph 9 of the amended plaint.**

13. The 2<sup>nd</sup> Defendant did not tender any evidence to support the assertion that he had indeed purchased the suit property from the 1<sup>st</sup> Defendant. The plaintiff having pleaded fraudulent conduct on the part of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in their dealing with the suit property, it was imperative for both defendants to demonstrate their bonafides in dealing with the property. The Plaintiff produced appropriate documents to support her claim that she had purchased the suit property from the original owner. The Plaintiff held the share certificate handed over to her after she purchased the land in respect of which Rebecca Kamoing had been allocated the land by the company. She also held the letter of allotment from the lands office issued to Rebecca Kamoing for title processing and the evidence shows she paid the necessary transfer fees of the share to the lawful firm of Maosa & Company Advocates and was issued receipts for the same.

14. To the contrary, the 2<sup>nd</sup> Defendant merely produced copies of the transfers of lease from Rebecca Kamoing to 1<sup>st</sup> Defendant and from 1<sup>st</sup> Defendant to the 2<sup>nd</sup> defendant and a copy of the Certificate of Lease registered in his name. The Plaintiff had disputed the signature attributed to Rebecca Kamoing on the Transfer of Lease to the 1<sup>st</sup> Defendant and produced an affidavit sworn by Rebecca Kamoing affirming she was not the one who signed the Transfer for Lease and denying she had ever sold the land to the 1<sup>st</sup> Defendant. The Plaintiff even questioned the existence of the 1<sup>st</sup> Defendant who she had been unable to serve and had to obtain leave of the Court to serve by way of substituted service by way of advertisement in the Newspaper.

15. In this case, the title held by the 2<sup>nd</sup> Defendant was under challenge and it was incumbent upon the 2<sup>nd</sup> Defendant to demonstrate how he acquired the title. The 2<sup>nd</sup> Defendant could only show he was a bona fide purchaser for value by producing a copy of the agreement for sale and proof of payment of the purchase price which he did not do. The Plaintiff had in her evidence cast doubts that the transfer of the property to the 1<sup>st</sup> Defendant from Rebecca Kamoing had been properly or lawfully procured. The Plaintiff's explanation that she had tried to process the registration of the transfer executed in her favour by Rebecca Kamoing but could not do so as the land office file was unavailable was not rebutted. There is every reason to believe that it was during this period when the records in the lands office could not be traced that the fraudulent scheme to transfer the property to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants respectively was perpetrated. I have observed elsewhere in this judgment that no evidence was adduced to support the transfers to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants save for copies of transfer of leases which the Plaintiff has challenged as having been fraudulent. In the present case, there is no evidence that the 1<sup>st</sup> Defendant and/or indeed the 2<sup>nd</sup> Defendant had procured all the necessary and appropriate completion documents before having the transfers registered in their favour. The suit property being a leasehold, a land rent clearance certificate, Commissioner of Lands consent and rates clearance certificate from the City Council were pre requisite and there is no demonstration that the same were availed before the transfers were effected.

16. The law protects property that has been lawfully acquired under Article 40 of the Constitution. However, property that is shown to have been fraudulently acquired is not protected. Section 26(1) (a) and (b) of the Land Registration Act, 2012 while upholding sanctity of title provides for the circumstances under which the title of a registered proprietor may be challenged. Section 26(1) (a) and (b) provides:

**26. Certificate of title to be held as conclusive evidence of proprietorship**

**(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except-**

**(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or**

**(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.**

17. In the present case, it is my view that the Plaintiff through her pleadings and evidence put out sufficient grounds to prove that the transfer of the suit property to the 1<sup>st</sup> Defendant and 2<sup>nd</sup> Defendant may have been fraudulently procured and unless the Defendants offered a rebuttal of that evidence the transactions would stand impugned. In the case of **Esther Ndegi Njiru & Another -vs- Leonard Gatei [2014]eKLR** this court annulled the title of the registered owner when it found that the initial registered owner who sold and transferred the property to the Plaintiffs who were the registered owners as at the trial had fraudulently caused the property to be registered in his name. The Court held that he had not acquired a valid title which he could lawfully transfer to the Plaintiffs.

18. In the case of **Munyu Maina -vs- Hiram Gathiha Maina [2013]eKLR** the Court of Appeal stated as follows:-

**“We state that when a registered proprietor's root title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is challenged and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances.”**

19. This court has in the cases of **Zebak Limited -vs- Nadem Enterprises Ltd [2016]eKLR** and **Shimoni Resort -vs- Registrar of Titles & 5 Others [2016]eKLR** held that the title of a bonafide purchaser without any notice of any defect in the title would be upheld if he proved that he truly purchased the property in good faith and had no notice of the fraud. In both of the cases which I decided I held that the rights of a bonafide purchaser who purchases a property in good faith and without any notice of any defect ought to be protected under the law. In the **Zebak Limited** case [supra] at paragraph 53 and 54, I stated thus:-

**53. There is considerable argument as to whether Article 40 (6) of the Constitution which provides thus:-**

**“The rights under this article do not extend to any property that has been found to have been unlawfully acquired”.**

**does in effect do away with the doctrine of sanctity of title conferred by registration under the Torrens System. My position is that it does not and that this constitutional provision has to be read in the context of other legal provisions such as the repealed Registration of Titles Act and the Land Registration Act, 2012 relating to indefeasibility of title of a bonafide purchaser. Thus in my view the most appropriate interpretation of Article 40 (6) of the Constitution and in the same vein Section 26 (1) (b) of the Land Registration Act, 2012 would be that they would apply to a defrauder and/or fraudster who is registered as owner and that there could have been no intention to deprive an innocent buyer of his property or compensation.**

54. In the present case after carefully reviewing the evidence I am persuaded the defendant was a bonafide purchaser for value of the suit property without any notice of any defect in the title and I do not find it was party to any fraud that would entitle its title to be impeached. In my view its title cannot be impeached under Section 26 (1) (a) and (b) of the Land Registration Act, 2012. The plaintiff has not proved the defendant was party to any fraudulent dealing and from the evidence adduced it is clear the defendant regularly purchased the property and cannot be said to have acquired the property illegally, unprocedurally or through a corrupt scheme. I am satisfied the defendant met the test laid out in the Uganda case of Appeal in Katende -vs- Haridas & Company Ltd [2008] 2 E A 174 where the judges of appeal defined a bona fide purchaser thus:

“A bonafide purchaser is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bonafide doctrine he must prove the following:

- He holds a certificate of title;
- He purchased the property in good faith;
- He had no knowledge of the fraud;
- He purchased for valuable consideration;
- The vendors had apparent good title;
- He purchased without notice of any fraud;
- He was not party to any fraud.

I agree with their Lordships itemization of what a person claiming to be a bonafide purchaser ought to show and I think the defendant in the instant suit has demonstrated all those requirements.

In the **Shimoni Resort** Case [supra] equally under paragraph 53, I expressed myself thus:-

53. It has been suggested and Hon. Justice Majanja appears to have taken this view in the case of **Isaac Gathungu Wanjohi & Another –vs- AG & 6 Others (Supra)** that Article 40 (6) which provides that, “The rights under this article do not extend to any property that has been found to have been unlawfully acquired” watered down the doctrine of sanctity of title such that any title that is found to have been procured unlawfully is not protected notwithstanding when the fraud was committed and by whoever. Literally interpreted this constitutional provision would appear to suggest even the title of a bona fide purchaser for value without any notice of fraud would not be protected if a predecessor of the title is found to have acquired the property unlawfully and/or fraudulently. For my part, I would fault such interpretation as it would mean the same constitution that protects the fundamental rights of all persons would be infringing the rights of the bonafide purchaser. The constitution should be interpreted under Article 259 of the Constitution in a manner that best promotes the object of the constitution. Article 259 (1) of the Constitution provides thus:

259 (1) This Constitution shall be interpreted in a manner that-

- (a) Promotes its purpose, values and principles.
- (b) Advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights.
- (c) Permits the development of the law; and
- (d) Contributes to good governance.

Sections 26 (1) (a) and (b) of the Land Registration Act, 2012 was enacted after the promulgation of the Constitution 2010 and clearly provided the title of a bonafide purchaser cannot be impugned unless the title holder is proved to have been a party to the fraud or misrepresentation that led to the registration of the title. In my view the most appropriate interpretation of Article 40 (6) of the Constitution would be that it would apply to a defrauder and there would be no intention to deprive an innocent buyer of his property. Thus Article 40 (6) of the Constitution in my considered opinion would only apply to registered owners who are found to have acquired the properties unlawfully. It is such property that would not be protected under Article 40 of the Constitution. The property in the hands of a bonafide purchaser would be protected even if it is shown that at some point in the past before the bonafide purchaser acquired the property the same had been fraudulently transacted.

20. In the present case, it is my view that the 2<sup>nd</sup> Defendant has failed to demonstrate he was a bonafide purchaser of the suit property. The Plaintiff has adduced evidence that she purchased the suit property from Rebecca Kamoing. Rebecca Kamoing through her affidavit affirmed that she sold the property to the Plaintiff and not the 1<sup>st</sup> Defendant. She denied executing the transfer in favour of the 1<sup>st</sup> Defendant. Faced with that evidence the 2<sup>nd</sup> Defendant could not merely have the title registered in his name to prove ownership. The very least he would have done was to demonstrate and prove he acquired the suit property in good faith as a bona fide purchaser. The title held by the 2<sup>nd</sup> defendant was under challenge and he having acquired the same allegedly from the 1<sup>st</sup> Defendant it is not clear why he could not get

the 1<sup>st</sup> Defendant to participate in the proceedings to vindicate his title.

21. In the premises, I am persuaded that the 1<sup>st</sup> Defendant did not acquire the suit property validly from Rebecca Kamoing and he equally did not pass a valid title to the 2<sup>nd</sup> Defendant. I am further satisfied the 2<sup>nd</sup> defendant was not a bona fide purchaser of the suit property and that the title of the property that he holds is null and void and is for cancellation.

22. The foregoing analysis and discussion disposes of the second and third issues.

23. The upshot is that I find the Plaintiff has proved her case on a balance of probabilities and I accordingly enter judgment in favour of the Plaintiff on the following terms:-

**1. A declaration is hereby issued that the transfer of Title Number Nairobi Block 116/1284 to the 1<sup>st</sup> Defendant and subsequently to the 2<sup>nd</sup> Defendant was null and void and the same are hereby ordered cancelled.**

**2. The title to land parcel number Nairobi Block 116/1284 issued to the 2<sup>nd</sup> Defendant, Gilbert Johnson Kibuika Kamau is hereby ordered to be cancelled and the title register rectified to reflect the name of Rebecca Kamoing.**

**3. A permanent injunction is issued against the Defendants whether by themselves, their servants or agents restraining them from trespassing or in any other manner interfering with the Plaintiff's occupation and possession of land parcel title number Nairobi Block 116/1284.**

**4. The costs of the suit are awarded to Plaintiff as against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.**

**JUDGMENT DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17<sup>TH</sup> DAY OF MAY 2019.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

Musili for the Plaintiff

N/A for the 1<sup>st</sup> Defendant

N/A for the 2<sup>nd</sup> Defendant

N/A for the 3<sup>rd</sup> Defendant

N/A for the 4<sup>th</sup> Defendant

Musyoki Court assistant

**J. M. MUTUNGI**

**JUDGE**